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No. 02-1545

In The
Supreme Court of the United States

CLEM ABRAMS AND JOHN BOHANNON,

Petitioners,

v.

CITY OF SAN DIEGO, CALIFORNIA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal For The State Of California Fourth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of San Diego respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the unpublished opinion of the California Court of Appeal, District Four, Division One. Pursuant to California Rule of Court Rule 977(a), the unpublished opinion of the Court of Appeal cannot be cited or relied upon by a court or a party in any other action or proceeding.

I.

INTRODUCTION

This is the conclusion of the third appeal in Petitioners' longstanding attack upon the San Diego City Council's decision to form a cost reimbursement district in 1990.[1] The District was established to compensate Mesa Shopping Center East [MSCE] for some of the costs it incurred in building several public improvements in the eastern Mira Mesa area of the City of San Diego [City]. These improvements provide special benefits to numerous undeveloped properties in the District, including Petitioners' property. Petitioners' challenge the City Council's decision on June 23, 1992 to increase the assessment levied against their property by approximately $545,000.

The four questions presented by Petitioners, although argumentative and hardly a model of clarity, revolve around the same legal theory. Petitioners contend that the

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[1] The cost reimbursement district is hereafter referred to as "the District."

City Council, the trial court, and the Court of Appeal erred by focusing upon the relationship between the final increase to the assessment and the special benefits received by Petitioners' property created by the District improvements. There can be no reasonable dispute that the public improvements financed through the District provide Petitioners with unique benefits not shared by the public generally. Because MSCE built the District improvements, Petitioners' agriculturally zoned land is capable of being developed at urban densities. The undisputed evidence in the record established that Petitioners' land increased in value over $2 million in 1992 because MSCE built the improvements at issue in this case. Under Petitioners' approach, the special benefits their land derives from the District improvements are wholly irrelevant to the validity of the assessment. However, well-settled case law, including several past opinions of this Court, hold otherwise. Assessments for the cost of public improvements have always been subject to a test of special benefit, and the Court of Appeal properly applied that test to facts presented here.

Moreover, while not required, the Court of Appeal in fact applied heightened scrutiny under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and affirmed the assessment in question. The Petition represents a thinly veiled attack upon the state court's factual findings underlying its conclusion that *Dolan's* "rough proportionality" test had been satisfied. The Supreme Court should not exert its jurisdiction to review a decision of a state court upon a question of fact.

Finally, as an independent ground for its decision, the Court of Appeal found that Petitioners waived any

challenge to the assessment. Petitioners fail to present any federal question in their attack upon this finding. This Court lacks jurisdiction to review the state court's independent and adequate state ground for its decision.

II.

BACKGROUND

Petitioners present an argumentative, incomplete, and, at times, incorrect statement of facts. A more thorough presentation of the facts is necessary to understand the basis for the June 23, 1992 increase to Petitioners' assessment.

A. Cost Reimbursement Districts

Under the California Subdivision Map Act, a city may require developers to install public improvements outside of their subdivision for the benefit of surrounding properties. Cal. Gov't Code § 66485. However, if a city imposes such a requirement, it must enter into an agreement to reimburse the developer for the cost of the supplemental improvements. Cal. Gov't Code § 66486. A city may pursue one of three methods to reimburse the developer: (1) the city can impose a reasonable charge on those who use the supplemental improvements; (2) the city may pay the costs of the supplemental improvements and then reimburse itself by levying a charge upon the real property benefitted; or (3) the city may establish and maintain a local benefit district for the levy and collection of charges from the benefitted properties. Cal. Gov't Code § 66487.

San Diego has chosen the third option in its implementing ordinance, San Diego Municipal Code section

62.0208. (Appellant's Appendix [A.A.] volume 3, p. 645).[2] Under the Municipal Code, the City may form a cost reimbursement district and include those properties that are specially benefitted from the construction of another developer's supplemental improvements. (*Id.* at p. 651, San Diego [S.D.] Municipal Code § 62.0208, subdivision (j)). Each property within a cost reimbursement district is assessed a share of the costs of the supplemental improvements based upon their respective benefit. (*Ibid.*) Benefit may be obtained by frontage or proximity to the supplemental improvements, release of anticipated infrastructure responsibilities, or by other means as determined by the City's Street Superintendent. (A.A v. 3, p. 651, S.D. Municipal Code § 62.0208(j)). The cost reimbursement assessment is imposed as a lien against the property receiving the benefit. The lien is initially approved based upon cost estimates of the supplemental improvements. (A.A. v. 3, p. 652). After the improvements have been constructed and the final costs have been audited, liens may be modified to reflect the actual costs of the supplemental improvements. (*Ibid.*) Assessments are paid only when a final map is recorded or a building permit is issued with a construction value in excess of $20,000. (*Id.* at S.D. Municipal Code § 62.0208(k)). If an assessment is collected, the proceeds are given to the developer who built the supplemental improvements, less an administrative fee collected by the City. (*Id.* at S.D. Municipal Code § 62.0208(l)).

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[2] Unless otherwise noted, all record references are to the three volume Appellant's Appendix before the Court of Appeal.

B. Petitioners' Share of the Cost Reimbursement District Improvements

The District at issue in this case was formed by the City Council in February 1990 to reimburse MSCE for the costs of building a series of public improvements of benefit to surrounding undeveloped properties. (A.A. v. 2, p. 374). MSCE was the first property owner on Mira Mesa Blvd. between Black Mountain Rd. and Interstate 15 to develop, and was required to install a series of supplemental public improvements for the benefit of neighboring undeveloped parcels. (A.A. v. 2, p. 466). These supplemental improvements included the widening of Mira Mesa Boulevard, the construction of a Cal Trans Park and Ride lot, and the relocation of overhead facilities. In addition, MSCE was required to construct portions of a new street [Westview Parkway] from Mira Mesa Blvd., past MSCE's northern boundary to Galvin Avenue. (*Ibid.*) MSCE was also obligated to construct the portions of Galvin Avenue fronting its property as well as a small section abutting Petitioners' parcel. (A.A. v. 2, p. 501). Finally, MSCE installed a new traffic signal on Mira Mesa Blvd. at the intersection of Westview Parkway. (A.A. v. 2, p. 468).

In September 1990, Petitioners' property was assessed $998,299 as its fair share of the estimated cost of the supplemental improvements built by MSCE. (A.A. v. 2, p. 375). Almost all of the $998,299 assessment represented the costs to: (1) acquire rights-of-way and construct the small portions of Westview Parkway and Galvin Avenue that provide ingress and egress to Petitioners' property; and (2) extend storm drains, water and sewer mains to exclusively serve Petitioners' property. (A.A. v. 2, p. 467). In addition, the $998,299 assessment included $24,633 of

the costs of building a Cal Trans Park and Ride lot adjacent to Petitioners' property.

Because the $998,299 assessment was approved while the improvements were under construction, the September 1990 assessment was based upon cost estimates to build these public improvements. *(See* A.A. v. 2, p. 466, noting that actual costs were not known until the improvements were built in 1992).

After a noticed public hearing on June 23, 1992, the City Council voted to increase Petitioners' assessment by approximately $545,000, for a total of $1.54 million. (A.A. v. 2, p. 468). The increase to Petitioners' assessment was approved after the improvements were built when the true costs of the supplemental improvements were known and audited. (A.A. v. 2, p. 466). The June 23, 1992, action merely spread cost overruns amongst the properties within the District. However, the formula for spreading the improvement costs was established when the District was originally formed in 1990. (*Id.* at pp. 468-470). Petitioners were assessed for the costs to build the portions of Westview Parkway and Galvin Avenue that fronted approximately 1.5 acres of their 9.31 acre parcel, including right-of-way acquisition costs and the costs to extend municipal utilities to their property. (*Id.* at pp. 468-469). MSCE dedicated the land needed to build the District improvements. (*Id.* at 469). Consequently, the right-of-way costs paid to Petitioners were the only reimbursable right-of-way costs included in the District.

C. Petitioners File Suit in August 1992 Challenging the Entire $1.54 Million Assessment and The City is Ordered to Demonstrate a Factually Sustainable Proportionality Between the Final Increase of $545,000 and the Benefit to Petitioners' Property.

Petitioners' original Petition/Complaint was filed in August 1992. (A.A. v. 1, p. 7). The trial court sustained the City's demurrer without leave to amend on statute of limitations grounds, however, that decision was reversed by the Fourth District Court of Appeal, Division One in case number D019566.

After the case was remanded, the trial court eventually granted a petition for writ of mandate on June 30, 1997. (A.A. v. 1, p. 1). Among other things, the trial court found that Petitioners were barred by the ninety-day statute of limitations in California Code of Civil Procedure 1094.6(e) from challenging almost $1 million of the $1.54 million assessment. (A.A. v. 1, p. 2). However, the lower court also found that the City had not demonstrated a factually sustainable proportionality between the increase to Petitioners' assessment approved on June 23, 1992, and the benefit to the property. (A.A. v. 1, p. 2). Petitioners never appealed the trial court's determination of the statute of limitations issue.

MSCE pursued an appeal of the trial court's judgment granting the petition for writ of mandate. The trial court's judgment was eventually affirmed by the Court of Appeal on March 6, 2000, in case number D029343. (A.A. v. 1, pp. 3-15). The appellate court concluded that the administrative record did not contain substantial evidence supporting a finding of rough proportionality between the final increase to the assessment and the benefits to Petitioners' property. (A.A. v. 2, p. 383).

D. The City Council Conducts a Public Hearing on June 19, 2000 and, on the Basis of New Expert Reports, Makes a Factual Finding of Rough Proportionality

Rather than participate in the appeal of the trial court's judgment, the City retained three independent consultants to reevaluate the increase to Petitioners' assessment. On June 19, 2000, the City Council voted unanimously to accept the amended cost reimbursement report [the Amended Report] by public finance consultant Jerome Fournier. (A.A. v. 2, pp. 597-598). On the same date, the City Council found that, based upon the Amended Report, the June 23, 1992, increase to Petitioners' assessment was roughly proportional to the benefits identified in the Amended Report. (A.A. v. 2, pp. 597-598). The Amended Report includes an appraisal prepared by Randy Tagg, a certified appraiser, and a development cost survey prepared by the Rick Engineering Company. (A.A. v. 2, pp. 464-596).

The Amended Report includes a detailed discussion of the benefits Petitioners' land realized from the supplemental improvements built by MSCE. Among other things, the Amended Report confirms that in 1992, MSCE completed construction of the streets and public utilities needed to serve the development of Petitioners' parcel at urban densities. (A.A. v. 2, pp. 520-529). As a result of MSCE's work, Petitioners have been relieved of future development costs and can immediately seek to rezone the property to develop at least 10-15 dwelling units per acre as proposed in the Mira Mesa Community Plan. (A.A. v. 2, pp. 482-501; pp. 533-535). Prior to the District improvements, Petitioners' land had extremely limited development potential. The land was zoned agricultural and Petitioners

could build by right only one single family residence. After construction of the District improvements, Petitioners' land had dramatically improved ingress and egress and could be rezoned to build a minimum of 87, and perhaps as many as 150 dwelling units. (A.A. v. 2, p. 537). Assuming development of a modest 87-unit project, Petitioners' land increased in value over $2 million in 1992 – in the depths of a recession – because of the improvements built by MSCE. (A.A. v. 2, p. 505).

The Amended Report also included a detailed engineering analysis by the Rick Engineering Company. (A.A. v. 2, p. 484). This analysis concluded, among other things, that Petitioners would have incurred $2.185 million in costs (in 1992 dollars) to install the minimum infrastructure necessary to service development of its property as envisioned in the Community Plan. Since MSCE satisfied these infrastructure costs, Petitioners can now develop without incurring these costs. The assessment is required to be paid only if by April 2010, Petitioners record a final subdivision map or the City issues a building permit with a construction value in excess of $20,000. If Petitioners do not develop their land by April 2010, the lien will be removed and Petitioners will escape any obligation to pay for any of the District improvements.

E. The Trial Court and the Court of Appeal Conclude that the City Council's June 19, 2000, Action is Supported by Substantial Evidence

Shortly after the City Council's June 19, 2000, decision, Petitioners filed a supplemental petition for writ of mandate. (A.A. v. 1, pp. 18-23). The supplemental petition alleged that the City failed to satisfy the trial court's

command to demonstrate a factually sustainable proportionality. (A.A. v. 1, p. 20, lines 19-20). Petitioners also claimed the City Council violated their procedural due process rights. (A.A. v. 1, p. 21). Following oral argument on January 9, 2001, the trial court denied the supplemental petition. (A.A. v. 3, p. 676).

Petitioners pursued yet another appeal, this time raising only a single issue, namely, whether the evidence before the City Council on June 19, 2000, provides substantial evidence to support the City Council's finding that the increase to the assessment is roughly proportional to the benefits received by their property. Petitioners abandoned any claim that the City Council violated their procedural due process rights.

On October 29, 2002, the Court of Appeal affirmed the trial court's judgment, concluding, *inter alia*, that: (1) Petitioners had waived any challenge to the general concept of including right-of-way costs in the District; and (2) the City Council's decision was supported by substantial evidence in the administrative record.

On December 6, 2002, the Court of Appeal denied a Petition for Rehearing filed by Petitioner, and on January 22, 2003, the California Supreme Court denied Petitioners' Petition for Review.

III.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Special Assessments for Public Improvements Have Long Been Governed by a Test of Special Benefit

Assessments against real property for the costs of public improvements have been subject to a test of special benefit for over a century. In *Illinois Central Railroad Co. v. Decatur*, 147 U.S. 190, 199 (1893), this Court defined the core attributes of an assessment as follows: "Special assessments . . . are made upon the assumption that a portion of the community is to be especially and peculiarly benefited, *in the enhancement of the value of property* peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions in consideration of the special benefit, shall be made by the persons receiving it." (italics added).

The cases in which this Court has applied the special benefit test are legion. For instance, in *Village of Norwood v. Baker*, 172 U.S. 269, 278 (1898), the Court observed,

> [u]ndoubtedly, abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property; such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. . . . And, according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and

> which may be subjected to special assessment to the meet the cost of such improvement.

(internal citations omitted).

In *Webster v. City of Fargo*, 181 U.S. 394, 395 (1901), the Court held that it is within the power of the legislature to create special taxing districts and to charge the cost of a local improvement, in whole or in part, upon the property in the district either according to valuation or superficial area of frontage. Similarly, in *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 343-344 (1901), the Court observed, "[t]he courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it . . . ." (internal quotations omitted); *see also Kansas City Southern Ry. Co. v. Road Improvement Dist. No. 3,* 266 U.S. 379, 386 (1924) ("By a long line of decisions in this court . . . the Legislature of a state may require that the cost of a local public improvement . . . be distributed over the lands particularly benefited, and charged against them according to their value, their area, or the benefits which they will receive . . . ."); *accord Atchinson T. & S.F. Ry. Co. v. Public Utilities Commission*, 346 U.S. 346, 352 (1953) (noting that assessments for the cost of street, sewer and drainage projects must bear some relationship to the benefits received by the property).

Other federal courts have similarly held that special assessments are constitutional if based upon the special benefits received by the assessed property. *See Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610, 615 (5th Cir. 1991) (holding that special assessments are founded upon special benefits and that local tax

assessments are constitutional unless they amount to such an abuse to be an outright confiscation of property); *see also McGowan v. Capital Center Inc.*, 19 F. Supp. 2d 642, 646 (S.D. Miss. 1998) (" . . . the underlying rationale for distinguishing 'special assessments' from 'taxes' relates not so much to the particular 'improvement' involved as to the particular benefit of the improvement – whether or not a tangible benefit – to the persons against whom the assessment is made.")

California courts have also applied the special benefit test developed by this Court. For instance, in *Dawson v. Town of Los Altos Hills,* 16 Cal. 3d 676 (1976), property owners challenged the imposition of sewer assessments against their property, claiming the assessments were adopted without statutory authority and were excessive. The Court in *Dawson* defined the legal test governing the adoption of assessments against real property as follows:

> As is manifest from this brief review, the establishment of a special assessment district takes place as a result of a peculiarly legislative process grounded in the taxing power of the sovereign. . . .
>
> The scope of judicial review of such actions is quite narrow. The board of supervisors is the ultimate authority which is empowered to finally determine which lands are benefited and what amount of benefits shall be assessed against the several parcels benefited. . . .
>
> This determination is made after a full hearing accorded to all persons interested to make such objection as they see fit. In such a case the court will not declare the assessment void unless it can plainly see from the face of the record, or from

> facts judicially known, that the assessment so finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed.

Dawson, supra, 16 Cal. 3d 683-684 (internal quotations and citations omitted).

A decade later, the California Supreme Court reiterated the standards applicable to special assessments in *San Marcos Water District v. San Marcos Unified School District,* 42 Cal. 3d 154 (1986). There, the Court held that a sewer capacity fee was properly characterized as an "assessment" which could not lawfully be imposed upon the school district. (*Id.* at 158). In defining the essential characteristics of an assessment, the Court, quoting its earlier opinion in *Spring Street Co. v. City of Los Angeles,*170 Cal. 24, 29 (1915), observed, "it [an assessment] is a compulsory charge placed by the state upon real property within a predetermined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement . . . " *San Marcos Water District, supra,* 42 Cal. 3d at 161. Distinguishing between a tax and an assessment, the Court concluded that an assessment "is a charge placed upon real property for local public improvement, of direct benefit to that property . . . " *Ibid.* quoting *Solvang Municipal Improvement Association v. Board of Supervisors,* 112 Cal. App. 3d 545, 552-553 (1980).

In *Knox v. City of Orland,* 4 Cal. 4th 132 (1992), the Court was called upon to determine whether a special assessment for park maintenance was a tax subject to the limitations of article XIII A of the California Constitution. Noting the difference between a tax and an assessment, the Court observed:

> The rationale of special assessment is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public. Thus, [a]lthough a special assessment is imposed through the same mechanism used to finance the cost of local government, in reality it is a compulsory charge to recoup the cost of public improvement made for the special benefit of a particular property.

Knox, *supra*, 4 Cal. 4th at 142 (internal quotes and citations omitted).

The Court in *Knox* held that special assessments will not be set aside by the judiciary "unless it clearly appears on the face of the record before that [legislative] body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed to the properties to be assessed or that no benefits will accrue to such properties." *Knox*, *supra*, 4 Cal. 4th at 146, quoting *Dawson*, *supra*, 16 Cal. 3d at 685; *accord Southern California Rapid Transit Dist. v. Bolen*, 1 Cal. 4th 654, 661 (1992) (noting that the essential feature of an assessment is that public improvement financed through it confers a "special benefit" on the property assessed.); *see also Not About Water Committee v. Board of Supervisors*, 95 Cal. 4th 982, 994 (2002) (applying the special benefit test to assessments subject to article XIII D of the California Constitution).

The "special benefit" test applicable to assessments has been consistently applied by the federal and California courts for almost a century. Petitioners fail to cite even a

single case applying a different standard to a challenge to an assessment against real property for public improvements. Thus, review is unnecessary to resolve conflicts within the case law.

B. A Special Assessment is not an Exaction Subject to Heightened Scrutiny Under *Nollan* and *Dolan*

The remaining issues raised by Petitioners are inseparable from their claim that the special benefit test should not apply. For instance, Petitioners contend that the City cannot rely upon appraisal reports to identify the value of the benefits received by their property. (Petition, pp. 21-22). In addition, Petitioners claim that the City was required to quantify the precise amount of traffic that potential development of their land might someday generate, yet Petitioners admit they have never submitted a development application for the land. (Petition, pp. 22-25). Both of these arguments are based upon the erroneous contention that assessments are not subject to the test of special benefit. As detailed above, however, Petitioners misstate the governing test applicable to assessments against real property to recoup the cost of public improvements.

The "nexus/rough proportionality" test developed in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374 (1994) is not directly applicable to special assessments. *Nollan* and *Dolan* involved government imposed property dedication requirements or monetary exactions as mitigation for the adverse impacts caused by development projects. These cases stand for the proposition that exactions imposed by the government as a condition of development will be

upheld where: (1) the condition has a nexus to a legitimate state interest; and (2) the exaction or dedication requirement is "roughly proportional" to the impact of the development. Neither *Nollan* or *Dolan* dealt with the validity of a special assessment.

In *Ehrlich v. City of Culver City,* 12 Cal. 4th 854 (1996), the California Supreme Court held that the *Nollan/Dolan* regulatory takings analysis may apply to nonpossessory exactions in limited circumstances. In *Ehrlich*, the Court held that the *Nollan/Dolan* analysis applies to a narrow class of monetary exactions:

> In our view, the intermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address just such indicators in land use 'bargains' between property owners and regulatory bodies – those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development. It is in this paradigmatic permit context – where the individual property owner-developer seeks to negotiate approval of a planned development – that the combined *Nollan* and *Dolan* test quintessentially applies.

Id. at 868.

Thus, under *Ehrlich,* heightened scrutiny is triggered when development permit conditions are imposed in a discretionary, ad hoc manner on individual projects. On the other hand, legislatively formulated assessments imposed upon a broad class of property owners are not subject to the heightened scrutiny required under *Nollan* and *Dolan. Id.* at 881. As explained more fully in Justice Mosk's concurring opinion in *Ehrlich*:

> Another kind of monetary exaction on property owners which is subject to fairly a deferential standard of judicial review is special assessments. Special assessment districts are established to permit cities and counties to charge groups of property owners for improvements from which they will especially benefit; the individual assessments are to be calculated in proportion to the estimated benefits to the parcels against which they are assessed.

Id. at 894 (Mosk, Justice concurring).

Here, the City Council was acting in a legislative capacity when it approved the cost reimbursement assessment. "[T]he establishment of a special assessment district takes place as a result of a peculiarly *legislative* process grounded in the taxing power of the sovereign . . . " *Dawson, supra*, 16 Cal. 3d at 683 (italics added); *see also Withnell v. Ruecking Const.* Co., 249 U.S. 63, 69 (1919) ("We are of [the] opinion that the assessment made in accordance with the rule of the St. Louis charter was legislative in character . . . ."). The City Council was not engaged in the process of negotiating approval of a planned development for Petitioners when it approved the assessment at issue in this case. Indeed, the City Council could have required all property owners in the District to begin paying their assessments immediately, which would clearly have exempted the assessments from heightened scrutiny under *Nollan* and *Dolan*. Instead, as a convenience to the property owner, the City Council required payment only when land is developed and the property owner is presumably in a more convenient position to pay off the assessment. The timing of the assessment, however, does not change its purpose. The assessment is adopted by legislative act and is broadly applicable to all

land owners in the District. Thus, the appellate court was not required to apply heightened scrutiny under *Nollan* and *Dolan*. *See Ehrlich, supra,* 12 Cal. 4th at 881 (noting that generally applicable development fees or assessments are outside the reach of the *Nollan* and *Dolan* cases).

C. Although Not Required, the Court of Appeal Applied Heightened Scrutiny Under *Nollan* and *Dolan*; the Petition Improperly Seeks Review of a State Court's Factual Findings

Even though it was unnecessary, the Court of Appeal applied the heightened scrutiny under *Nollan* and *Dolan*, and affirmed the trial court's judgment. Petitioners' central complaint is that neither the trial court nor the Court of Appeal required the City to prepare hypothetical traffic studies to measure the number of traffic trips that might someday be generated, if and when Petitioners seek to develop their land. Petitioners' arguments do not merit review by this Court for several reasons.

First, Petitioners ask this Court to exert its jurisdiction to review a decision of a state court upon a question of fact, i.e., whether the assessment satisfied *Dolan's* rough proportionality standard. The Court should not reexamine a state court's findings and conclusions of fact. *Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("Our cases have indicated that, in the absence of exceptional circumstances, we would defer to the state-court factual-findings even when those findings relate to a constitutional issue.") "[A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional issue." *Miller v. Fenton*, 474 U.S. 104, 113 (1985).

Second, Petitioners' interpretation of the *Nollan/Dolan* test in the context of special assessments not only finds no support in the case law, the test is simply impractical. Petitioners' proposed test requires highly speculative assumptions. For instance, Petitioners' land remains undeveloped today and the City has no idea when and how Petitioners will seek to develop. The amount of traffic that the property might generate is known only to Petitioners, since they control the scope and timing of development. Petitioners may seek to amend the City's Progress Guide and General Plan to allow for a more intense use. Because Petitioners' property is located in a transit corridor near a heavily traveled freeway and is surrounded with retail commercial uses, it may be wise for Petitioners to seek to develop at a higher density, or for that matter, to seek a Community Plan amendment for a commercial use. Even if Petitioners develop their land consistent with the Community Plan, there is a wide range of average daily trips that could be generated because the Plan allows for a range of densities. The bottom line is that the City does not know how Petitioners will attempt to develop their land, and therefore, cannot determine how much traffic will be created until Petitioners apply to develop their land.

The more accurate way to identify "benefit" in this case is to determine what a willing buyer would pay for the property before and immediately after the improvements were constructed, as the City has done. The approach adopted by the Court of Appeal has long been accepted. *Illinois Central Railroad Co. v. Decatur*, *supra*, 147 U.S. at 199; *see also Cogan v. City of Los Angeles* 34 Cal. App. 3d 515 (1973) ("[b]enefit has been defined as the 'enhancement of the property's market value in relation to

reasonably potential uses as well as present use.'") (internal quotations omitted).

Finally, there is substantial evidence in the record to support the conclusion that Petitioners' assessment is roughly proportional to the "impacts" that would be created by development of Petitioners' land. The administrative record includes a detailed engineering analysis by the Rick Engineering Company. (A.A. v. 2, p. 484). This analysis concludes that Petitioners would have incurred $2.185 million in costs in 1992 to install the minimum infrastructure necessary to service development of their property as envisioned in the Community Plan, including street improvements, sewer, water and storm drains. The private engineering firm concluded that MSCE built all of the improvements Petitioners would otherwise have been forced to construct to develop 87 dwelling units. Had Petitioners been forced to build these improvements, the engineering report indicates that Petitioners would have spent $2.185 million in 1992. Instead, MSCE absorbed the entire cost and Petitioners will only pay the assessment, if they develop before 2010. Thus, the Rick Engineering Report provides additional support for the finding of rough proportionality.

Petitioners' claim that their land has been overassessed is defeated by other portions of the record. At the trial court level, Petitioners claimed they should be assessed somewhere between 2.8 percent and 8.7 percent of the right-of-way costs of Westview Parkway, since development of their property with 87 units will generate 8.7 percent of the current traffic, and 2.8 percent of the projected traffic utilizing Westview Parkway.

However, Petitioners have not been assessed for the portion of Westview Parkway providing for local traffic

movement. Instead, they only bear responsibility for the portion of the street that provides *direct access* to their property. Petitioners bear none of the cost for the segment of the street outside of the boundaries of their property. (*See* A.A. v. 2, p. 501; A.A. v. 3, p. 656).

Westview Parkway measures 6,830.98 feet in length. (A.A. v. 3, p. 656). The portion of Westview Parkway between Mira Mesa Blvd. and Galvin Avenue at issue in this case measures 1,084.95 feet, and was built at a cost of $2,653,954 including both right-of-way and construction costs.[3] The segment of Westview Parkway from Capricorn Way to Black Mountain Rd. (north of Petitioners' property line) is 4,128.05 feet and cost Petitioners' northern neighbor $5 million to build. (A.A. v. 3, p. 656; A.A. v. 1, p. 256). The middle segment of Westview Parkway from Galvin Avenue to Capricorn Way is 1,617.98 feet. (A.A. v. 3, p. 656). This segment was also built by Petitioners' northern neighbor at an estimated cost of $2,958,476.[4]

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[3] This figure is arrived at by adding the construction cost of the road, the right-of-way costs paid to Petitioners, and the value of the right-of-way dedicated by MSCE. (A.A. v. 2, p. 468, table 1 and p. 470, table 2).

[4] Westview Parkway, from Galvin Avenue to Black Mountain Rd. is 5,746.03 feet in length. (A.A. v. 3, p. 656). This includes a 4,128.05 foot stretch of Westview Parkway between Capricorn Way and Black Mountain Rd. that cost $5 million to build. (A.A. v. 3, p. 656; A.A. v. 1, p. 256). A middle segment of Westview Parkway between Galvin Avenue and Capricorn Way is 1,617.98 feet in length. (A.A. v. 3, p. 656). The middle segment was built at an estimated cost of $2,958,476. The cost estimate for the middle segment is calculated by averaging the cost per linear foot for the segment of Westview Parkway between Capricorn Way and Black Mountain Rd. [$1,211 per foot] with the cost per linear foot in the southern segment of Westview Parkway between Mira Mesa Blvd. and Galvin Avenue [$2,446 per foot]. This average is $1,828.50

(Continued on following page)

Therefore, the total cost of Westview Parkway was approximately $10,612,440.

The record shows that Petitioners were assessed for $941,859 of the total cost of $10,612,440. (*See* A.A. v. 2, p. 468, table 1 and p. 470, table 2). This includes both the construction costs for the portions of the street on Petitioners' property and the right-of-way costs paid to Petitioners. This represents 8.8 percent of the total costs for Westview Parkway. Thus, the City satisfied Petitioners' interpretation of the "rough proportionality" test.

D. The Court of Appeal's Decision is Based Upon an Independent and Adequate State Ground

As an independent basis for its decision, the Court of Appeal found that Petitioners were time barred from challenging the June 1992 increase to the assessment. Specifically, the Court of Appeal concluded,

> Because Abrams did not timely challenge the fundamental nature of the improvements, including the acquisition of his rights-of-way, for which the cost reimbursement lien was imposed on his property, we believe he is precluded from arguing that the costs, whether estimated or actual, of acquisition of his rights-of-way was not properly assessed to his property by means of the reimbursement lien.

(Petitioners' Appendix [Pet. App.] pp. 13-14).

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per foot, or $2,958,476 for the middle segment. Thus, the estimated total cost of Westview Parkway north of the Appellant's property is $7.95 million.

The appellate court correctly noted that when the City originally approved the District and the related assessments in 1990, the City had finally determined that Petitioners would bear the cost of those portions of Westview Parkway and Galvin Avenue necessary to provide access to their property. (Pet. App. p. 14). As stated by the Court of Appeal, "[b]ecause Abrams did not timely challenge the 1990 original and increased reimbursement liens imposed by City on his property for district improvements, which included the estimated costs for acquiring his rights-of-way, the amounts of those liens, and presumably the improvements underlying those amounts cannot now be challenged." (Pet. App. p. 14). The Court relied upon the ninety-day statute of limitations in California Code of Civil Procedure section 1094.6(e). That statute provides a ninety-day time period to file a petition for writ of mandamus in state court to challenge the City Council's decision after a noticed, public hearing. (Pet. App. p. 14, fn.6).

Although Petitioners claim the Court of Appeal erred in reaching this result, they fail to cite any authority to support their position. More importantly, Petitioners neglect to identify a federal issue in their attack upon this portion of the Court of Appeal's unpublished decision. As previously stated by this Court, "[the United States Supreme] Court will not take up a question of federal law presented in a case 'if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" *Lee v. Kemna*, 534 U.S. 362, 375 (2002), quoting *Coleman v. Thompson*, 501 U.S. 722, 799 (1991). "The rule applies with equal force whether the state-law ground is substantive or procedural." *Lee, supra,* 534 U.S. at 375. Here, the

Court of Appeal's resolution of the statute of limitations issue provides an independent and adequate state ground for its decision.

Furthermore, the Court of Appeal correctly decided the statute of limitations question. Contrary to Petitioners' claims, the unpublished decision does not give the City "carte blanche" authority to make whatever changes it desires to the assessment, after it is initially approved. The Court of Appeal merely recognized that when the assessment was initially approved in February 1990 and later amended in September 1990, the City indicated that specified street right-of-way costs would be borne by Petitioners. The final increase to the assessment in 1992 was attributable to increased right-of-way costs that the City had already clearly determined in 1990 would be borne by Petitioners. Petitioners never timely challenged the City Council's adoption of the assessments in February and September 1990. Accordingly, Petitioners cannot challenge the notion of including the right-of-way acquisition costs in the assessment, since they failed to timely file a petition for writ of mandamus within ninety days as required by California Code of Civil Procedure section 1094.6(e).

Petitioners seek to avoid this obvious result by claiming the City approved a new alignment for Westview Parkway, after September 1990. Petitioners contend, without any evidentiary support, that the new alignment was designed to shift more of the street onto their property, and thereby shift the costs of the street to them.

While this argument does not appear to have been raised at the administrative level, and therefore, has not been preserved for appellate review, Petitioners are simply

wrong on the merits. The alignment of Westview Parkway and Galvin Avenue was confirmed when the City Council approved MSCE's tentative map in 1989. The alignment of Westview Parkway, as approved by the City Council, appears at page 39 of the administrative record in case number D029343. The drawing is dated January 29, 1990, *before* the initial cost reimbursement district was formed in February 1990. There were no changes to the alignment of the streets in question.

IV.

CONCLUSION

For the foregoing reasons, Respondent City of San Diego, requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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